

IN THE  
MISSOURI SUPREME COURT

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STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No.SC 84538
	)	
KAREL M. SAMMONS,	)	
	)	
Appellant.	)	

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APPEAL TO THE MISSOURI SUPREME COURT  
FROM THE CIRCUIT COURT OF MARION COUNTY, MISSOURI  
10<sup>th</sup> JUDICIAL CIRCUIT, DIVISION I  
THE HONORABLE ROBERT M. CLAYTON, JUDGE

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APPELLANT'S REPLY BRIEF

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### **JURISDICTIONAL STATEMENT**

The Jurisdictional Statement on page 5 of Appellant's original brief is incorporated herein by reference.

### **STATEMENT OF FACTS**

The Statement of Facts on pages 6 through 9 of Appellant's original brief is incorporated herein by reference. Appellant replies to the Respondent's statement of facts as follows:

On pages 7 of Respondent's statement of facts, Respondent asserts that, "Beilsmith, from his car, saw appellant leave Blackburn's house (Tr. 142)." That is a misstatement of the facts. Beilsmith testified that he saw a black male wearing light colored pants leave Blackburn's house. He could not identify the man because he never saw his face (Tr. 142, 143).

### **POINT RELIED ON**

**The trial court erred in overruling Appellant’s motion for judgment of acquittal, giving Instruction #8, the verdict director for Count II of the Amended Information and in sentencing Appellant upon his conviction of selling a controlled substance because the State did not prove that offense beyond a reasonable doubt, in violation of Appellant’s right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not present any evidence from which a rational trier of fact could have reached a “subjective state of near certitude” that Appellant “knowingly sold” crack cocaine to Craig Haley in that there was no evidence of Appellant's intent or ability to complete the sale.**

*State v. Brown*, 253 N.E.2d 478 (Ill.App., 1969);

*State v. Crumbaker*, 753 S.W.2d 76 (Mo.App., E.D. 1988);

*State v. Roberts*, 779 S.W.2d 576 (Mo.banc 1989);

*State v. Starr*, 204 Mont. 210, 664 P.2d 893 (Mont. App. 1983);

U.S. Const. Amend. V;

Mo. Const. Art. I, Section 10;

Ill.Rev.St.(1961) Ch. 38 Section 22-2-11;

Illinois Controlled Substances Act, 720 ILCS Ch.570.

## ARGUMENT

**The trial court erred in overruling Appellant's motion for judgment of acquittal, giving Instruction #8, the verdict director for Count II of the Amended Information, and in sentencing him upon his conviction of selling a controlled substance because the State did not prove that offense beyond a reasonable doubt, in violation of Appellant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, §10 of the Missouri Constitution, in that the State did not present any evidence from which a rational trier of fact could have reached a "subjective state of near certitude" that Appellant "knowingly sold" crack cocaine to Craig Haley in that there was no evidence of Appellant's intent or ability to complete the sale.**

Appellant incorporates by reference his Argument contained on pages 12 through 28 of his original brief. He replies to Respondent's argument as follows

Respondent cites *State v. Crumbaker*, 753 S.W.2d 76 (Mo.App., E.D. 1988) for the proposition that "[i]t is not necessary that the elements of a commercial sale, i.e., fixed price, delivery, and payment, be present in order to constitute a sale." Resp. br. at 13. However, in affirming Crumbaker's conviction, the court went on to conclude that, "[f]rom the evidence, a jury could conclude that defendant's actions constituted a sale under Section 195.010 RSMo. The jury could find that defendant negotiated the price *and delivered the goods.*" *Id.* at 78 (emphasis added). Respondent goes on to argue that "[i]t is absolutely irrelevant

that a controlled substance was neither present during negotiations nor transferred from one party to the other.” Resp. br. at 13-14. What the State overlooks is the relevance of the seller’s intent and ability to actually sell a controlled substance. The State introduced no evidence from which a rational trier of fact could conclude that Appellant actually intended to deliver crack cocaine to Haley. The only reasonable inference from the evidence is that Appellant’s intent was to take Haley’s money.

In a footnote, Respondent attempts to distinguish *State v. Starr*, 204 Mont. 210, 664 P.2d 893 (Mont. App. 1983) and *Shanks v. Commonwealth*, 463 S.W.2d 312 (Ken.App., 1971) on the basis that these cases involved situations where the defendants were selling what they knew to be counterfeit drugs. Resp. br. at 14 n.3. That is true. But the importance of these cases to Appellant’s case is the courts’ reasoning. In both, the courts held that if a defendant offered to sell what he believed was a real, rather than counterfeit, drug, he would be liable for the crime of selling a controlled substance. *Starr*, 204 Mont. at 214; *Shanks*, 463 S.W.2d at 315. That is so because under that situation, the defendant “ha[s] present the union of an act and a criminal intent, both of which are normally required to constitute a crime.” *Shanks*, 463 S.W.2d at 315. That is what is missing from the State’s case against Appellant, proof that he committed an act and had the requisite criminal intent to sell a controlled substance.

In support of its argument that words alone may be enough to support a criminal conviction, Respondent cites *State v. Roberts*, 779 S.W.2d 576 (Mo.banc

1989) Resp. br. at 15. In that case the defendant was arrested for prostitution before she actually performed any sexual act with an undercover police officer. But Roberts was offering to sell her body, and therefore she had the present ability to consummate the sale at anytime and any place. In addition, by driving with the officer to a secluded spot, Roberts was evincing her intention to fulfill her end of the bargain. *Id.*

Respondent cites *Francis v. State*, 890 S.W.2d 510 (Tex.App., 1994) and *Jiminez v. State*, 838 S.W.3d 661 (Tex.App., 1992) as examples of a State in which words alone are sufficient to constitute the crime of selling a controlled substance. Resp. br. at 15-17. Both rely on *Stewart v. State*, 718 S.W.2d 286 (Tex.App. 1986) which is discussed in Appellant's opening brief at pages 24-25.

Respondent also cites *State v. Brown*, 253 N.E.2d 478 (Ill.App., 1969) in which the court upheld the defendant's conviction based on the Illinois' Uniform Narcotic Drug Act<sup>1</sup> Resp. br. at 17. Illinois repealed that Act in 1971 and replaced it with the Illinois Controlled Substances Act, 720 ILCS Ch.570. Under the new law, "sale" is not defined. "Delivery" is defined as "the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 ILCS Ch. 570 Section 102 (Definitions). 720 ILCS Ch. 570 Section 401, in relevant part, now makes it "unlawful for any person knowingly to manufacture or deliver or possess with intent to manufacture or deliver, a controlled or counterfeit

substance or controlled substance analog.” Appellant has been unable to find any cases similar to his which have been decided by the Illinois courts since the change in the law. However, it is noteworthy that in its revision, the Illinois legislature deleted its previous definition of “sale” and no longer includes the language cited in *Brown* as support for affirming the conviction. 253 N.E.2d at 232.

The state failed to offer any evidence that Appellant had the intent or the ability to sell a controlled substance to the informant in this case as alleged in Count II of the Information. This court should vacate that conviction and discharge Mr. Sammons from his sentence on Count II.

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<sup>1</sup> Ill.Rev.St.(1961) Ch. 38 Section 22-2-11.

## **CONCLUSION**

For the reasons stated here, and in Appellant's original brief, this Court should vacate his conviction for Count II, selling a controlled substance, and discharge him from his sentence on that charge..

Respectfully submitted,

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### **Certificate of Compliance and Service**

I, Nancy A. McKerrow, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 1,236 words, which does not exceed the 3,785 words allowed for an appellant's reply brief.
- ✓ The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in August 2002. According to that program, the disks provided to this Court and to the Attorney General are virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 27<sup>th</sup> day of August, to Anne E. Edgington, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

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